No. 75-637

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IN THE

Supreme Court of the United States

October Term, 1975

CAL G. TAYLOR and THELMA H. TAYLOR, his wife; PHILLIP TAYLOR: DELORIS RAY: DONALD C. TAYLOR and LADON'S PARKETTES CORPORATION,
Petitioners,

v.

R. & A. CONSTRUCTION, INC.,
Respondent, and

LETTIE LAFAUN TAYLOR,
Respondent.

BRIEF OF RESPONDENT R & A CONSTRUCTION, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Respondent R & A Construction, Inc. submits (1) that Petitioners raise no substantial federal question, (2) that even if it be assumed, arguendo, that a substantial federal question has now been raised, Petitioners failed to timely and with fair precision raise that question for consideration by either the Court of Appeals of the State of Washington or the Supreme Court of the State of Washington, and (3) that regardless of the foregoing, the state court decision now sought to be reviewed rests firmly upon state grounds wholly independent of the "federal question" now

raised. Under the circumstances, this Court lacks jurisdiction to grant review by certiorari in this cause.

Although the record presented in the Petition for Writ of Certiorari (the Petition) manifests glaring omissions in terms of a failure to show that the "federal question" now urged was timely raised and preserved in the state court proceedings, it is not necessary for the purposes of this brief to supplement the Statement of the Case nor the Appendix incorporated in the Petition.

PETITIONERS RAISE NO SUBSTANTIAL FEDERAL QUESTION

Without specifying the precise basis therefor, Petitioners state that

> "The jurisdiction of this Court to entertain the Petition for Certiorari is based upon Title 28, USC, §1257."

That statement is immediately followed by an argument that

> (1) RCW 2.06 et seq., State of Washington legislation implementing Amendment 50 to the Constitution of the State of Washington (designated Article IV, §30 thereof) constitues an invalid exercise of power by the state legislature because the statute purports to repose "exclusive appellate jurisdiction" in a newly constituted intermediate Court of Appeals, whereas Article IV, §4 of the Constitution of the State of Washington grants that appellate jurisdiction to the State Supreme Court, and
>
> (2) That as a consequence of the refusal of the Supreme Court of the State of Washington to review the decision of Division I of the Court of Appeals of the State of Washington, Petitioners were denied due process of law and equal protection of the laws under both the State and Federal Constitutions.

The argument is presumably addressed to that portion of Title 28, §1257 granting this Court jurisdiction on a petition for writ of certiorari

> ". . . where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States . . ."

At the heart of this argument is the assumption, wholly unsupported by decisional law of the courts of the State of Washington, that RCW 2.06 et seq. is in fact repugnant to Article IV, §4 of the Constitution of the State of Washington. As this Court has frequently held, the construction of state laws is the exclusive responsibility of state courts. *Speiser v. Randall*, 78 S.Ct. 1332, 357 US 513, 2 L.Ed.2d 1460, and

> "We are asked to go into the proper construction of the state statute and its validity under the state constitution. But these are questions of local law, the decision of which by the supreme court of the state is controlling." *First National Bank of Garnett v. Ayers*, 16 S.Ct. 412, 160 US 660, 664, 40 L.Ed. 573.

and

> "The question whether or not a state statute conflicts with the constitution of the state is settled by the decision of its highest court." *Carstairs v. Cochran*, 24 S.Ct. 318, 193 US 10, 16, 48 L.Ed. 596.

Moreover, where state courts have not passed on a question involving construction of a state statute, the Supreme Court of the United States should not adopt a construction which might render the statute of doubtful validity, but will await determination on the issue by state courts. *Stevenson v. Binford*, 53 S.Ct. 181, 287 US 251, 77 L.Ed. 268.

Assuming arguendo, however, that the purely state law

question presented here might warrant review by this Court in light of the due process and equal protection implications Petitioners advance, a number of critical questions remain unanswered, i.e., was the "federal question" raised before the state courts and if so, at what stage, in what manner, and in what fashion did the state court pass upon the question? These questions lead directly to the second stage of this analysis, for in point of fact the "federal question" now urged by Petitioners was never raised before nor passed upon by the courts of the State of Washington in the instant case.

PETITIONERS' FAILURE TO TIMELY RAISE AND PRESERVE THE "FEDERAL QUESTION"

Petitioners now challenge jurisdiction of the Court of Appeals of the State of Washington to review the trial court decision of the Superior Court of King County, and demand a full review of the trial court decision by the Supreme Court of the State of Washington. The Rules of the Supreme Court of the United States, and in particular Rule 23(f) thereof, expressly dictate that when review of a state court judgment is sought the petition for certiorari must specify, *inter alia*,

> (1) The stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised,
>
> (2) The method of raising [the federal questions sought to be reviewed], and
>
> (3) The way in which [the federal questions sought to be reviewed] were passed upon by the [lower] court.

Rule 23(f) of the Rules of the Supreme Court of the

United States further require that the foregoing matters be set forth in such form

> ". . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Compliance with the above quoted portions of Rule 23(f) is clearly jurisdictional, for as stated in *Wilson v. Cook*, 327 US 474, 90 L.Ed. 793, 799, in construing §237 of the Judicial Code [Now 28 USC §1257].

> "We are without jurisdiction of the appeal in No. 328, unless there was 'drawn in question' before the Supreme Court of Arkansas 'the validity of a statute' of the state, 'on the ground of its being repugnant to the constitution . . . or laws of the United States.' The purpose of this requirement is to restrict our mandatory jurisdiction on appeal (citations omitted) and to make certain that no judgment of the state court will be reviewed on appeal by this court *unless the highest court of the state has first been apprised that a state statute is being assailed as invalid on federal grounds*, (citations omitted) or, when the statute, as applied, is so assailed, *until it has opportunity authoritatively to construe it*. (Citations omitted) This *jurisdictional requirement* is satisfied only if the record shows that the question of the validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state (citations omitted) or has in fact been decided by it (citations omitted) and that its decision was necessary to the judgment. The record in this case does not disclose that at any time in the course of the proceedings in the state courts plaintiffs asserted the invalidity of a state statute on any federal ground." (Emphasis added)
>
> * * *
>
> "As the record does not show that the plaintiffs presented for decision to the state supreme court any federal question, they have no appeal to this court un-

> less the opinion of the state supreme court shows that the court ruled on the validity of a state statute under the laws and Constitution of the United States. (Citations omitted)."

The *Wilson* court further noted that

> "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court. (Citations omitted)" (90 L.Ed. 793, 801).

As this court will recognize, the instant Petition for Writ of Certiorari makes no showing whatsoever that the "federal question" now urged was at any stage presented to or considered by either the Court of Appeals of the State of Washington or the Supreme Court of the State of Washington in determining this cause. At no time did Petitioners challenge the jurisdiction of the Court of Appeals of the State of Washington to hear and determine this matter on appeal from the trial court, and at no time did Petitioners demand review by the State Supreme Court on the theory now urged relating to Petitioners' construction of the Constitution of the State of Washington. The "federal question" Petitioners advance is in fact now urged for the first time

before any court in the instant Petition for Writ of Certiorari.

THE TRUE GROUND OF DECISION

Not having been called upon to even consider the "federal question" now urged by Petitioners, it is not the least bit surprising to find that the state court judgment (and subsequent Court of Appeals decision) here involved rests quite firmly in a determination of state law questions. The Court of Appeals Memorandum Decision which the Supreme Court of the State of Washington declined to review makes no reference whatsoever to the involvement of a "federal question", much less any reference to resolution of a "federal question" as being necessary to determination of the cause. On the contrary, the Court of Appeals Memorandum Decision unequivocally states that

> "The appropriate disposition of this action is best undertaken by initially discussing the last issue presented, that of laches and estoppel." (Petition for Certiorari, p. 35)

and

> "Our decision on this issue makes a discussion of the other issues raised by defendants unnecessary." (Petition for Certiorari, p. 40)

The "other issues raised by defendants" (Petitioners here) are recited in the Court of Appeals Memorandum Decision (Petition for Certiorari, p. 35) and included allegedly defective service of process, alleged record notice of alleged title defects, alleged fraud of Respondent's predecessor in interest, and Respondent's alleged lack of status as a bona fide purchaser. Clearly none of those issues involved federal questions contemplated by either 28 USC. §1257 or Rule 23(f) of the Rules of the Supreme Court of the United States.

Even if it might somehow be argued that a federal question was properly raised below and preserved on appeal in the state court proceedings, a matter the Petition here manifestly fails to show, the cause was nonetheless clearly decided on adequate and independent state grounds. As noted in *Durley v. Mayo*, 351 US 277, 100 L.Ed. 1178, 1183

> "It is a well established principle of this court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction and that its decision fo the federal question was necessary to its determination of the cause. (Citations omitted)"

The proposition thus stated is discussed at length in numerous decisions compiled in an annotation found at 84 L.Ed. 926, an annotation updated in 100 L.Ed. 1200, it being unequivocally stated in the latter that

> "Thus the more recent decisions provide ample support for the proposition that review by the Supreme Court of a state court decision requires that it be shown (1) that the state court actually decided a federal question, and (2) that decision of the federal question was necessary to the state court's determination of the cause (there being no adequate state ground upon which the state court's judgment could have rested)."

The state court decision sought to be reviewed here clearly rests solely upon state law grounds. The record before this Court affirmatively shows that the "federal question" now urged was not even presented for consideration by the state courts. It necessarily follows that decision of a federal question was not necessary to the state court's determination of the cause.

CONCLUSION

In summary, Respondent submits that Petitioners do not in fact pose a substantial federal question for review, and that even if the contrary be assumed, arguendo, the "federal question" now raised was neither presented to nor considered by the appellate courts of the State of Washington. In the final analysis the decision sought to be reviewed was determined solely upon state law grounds and in no fashion turned upon a determination of a "federal question". For the various reasons set forth herein, Respondent R & A Consruction, Inc. respectfully submits that this Court lacks jurisdiction to review the state court decision here involved and should forthwith deny this Petition for a Writ of Certiorari.

Respectfully submitted,

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